Mischiefs of Faction

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MISCHIEFS OF FACTION: Our Legislature is deeply mired in partisan political divisions and hairsbreadth majorities. Voters, exercising their powers of direct legislation through initiative, are equally discordant, approving measures directly in conflict with others. And the agencies of the Executive branch are paralyzed by the absence of legislative consensus and the leadership that clear directives, clear priorities confer. Into this era, the third branch of government—the Judiciary—steps powerfully into the center. Delivering administrative rulings, the courts keep agencies to their timetables and legislatures focused on their constitutional duties. And the courts serve, because the paralyzed legislature cannot, to pore through the intent of voter initiatives and subordinate their conflicting aims.

It's not at all what the framers of the Constitution desired; but it was certainly what the framers *anticipated* in assigning to the judiciary the power to decide cases and controversies, and serve as the forum of last resort in the administration of justice.

"Complaints are everywhere heard," James Madison wrote in essays before the nation was born, "that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." His arguments laid the foundation for considering the courts not as first resort, but last resort in protecting the public good.

"The *causes* of faction cannot be removed," Madison wrote, "and that relief is only to be sought in the means of controlling its *effects.*"

In 2000, Washington voters by a significant margin approved Initiative 728, to reduces classroom sizes, extends learning programs, expands teacher training, and construct

facilities. Voters in 2014 approved Initiative 1351, again intended to reduce classroom sizes in primary education. Implicit in both I-728 and I-1351 is the understanding that these initiatives would cost money, in the case of the latter as much as $4.7 billion through 2019, based on estimates by the state Office of Financial Management. In 2012, voters also approved I-1240, the Washington Charter School initiative, which was understood to compete with public schools for limited financial resources. In approving these measures, voters were agreeing to the expenditures.

Meanwhile, however, voters were also routinely approving measures that crippled the state's ability to raise and spend revenues. The latest of these is Initiative 1366, approved by voters in November, which will strip $8 billion out of the state's general fund over the next six years.

In 2007, educators and public interest groups took their concerns about the status of public education to court, seeking an order that would require the State of Washington to live up to its paramount constitutional duty to make ample provision for basic education for children. This became known as the *McCleary* decision. The state Supreme Court agreed; and became custodian on the issue of funding public schools, setting timetables for legislative and executive action and (in the absence of leadership from the legislative branch) subordinating issues in conflict.

Even without I-1366, the state's budget outlook looks grim, according to a report released last week by the state's Economic and Revenue Forecast Council. Forecasters project a nearly $500 million budget shortfall by 2019. Revenues are insufficient to maintain existing investments in schools, let alone meet the requirements of *McCleary.*

In September, the court kicked over the charter schools initiative, after deliberating on the matter for more than a year, as conflicting with the goals of *McCleary.*

"The Act," justices wrote, "identifies charter schools as common schools and is expressly reliant on common school funding to support such charter schools. That a funding source is required for the existence of charter schools is self-evident. As discussed above, the Act specifically intends to use common school funding allocations as that source. Without a valid funding source the charter schools envisioned in I-1240 are not viable."

Last week the high court reasserted its decision, declaring it would not reconsider its ruling striking down the state charter school law. The court denied all requests for reconsideration, but accepted arguments from the state Attorney General that one section of its original ruling was overbroad and could make other kinds of alternative schools ineligible for state dollars—programs like Running Start, tribal compact schools, and vocational education—long considered part of the state's education portfolio.

The Supreme Court also released its determination on the crippling Initiative 1366, finding insufficient assurance to strike it from the ballot but issuing grave concerns about its fundamental purpose and whether it exceeds the scope of the people's initiative

power. Those questions may be remanded back to King County Superior Court for more complete consideration.

A columnist for the *Seattle Times* speculated that action to overturn the initiative may be premature, and that it could "serve to spur the Legislature to seek new, progressive revenue sources.

"There's nothing in the measure that says they can't go ahead and cut the sales tax, then replace that lost revenue with something else," columnist Danny Westneat noted.

"In fact doing exactly that has been a long-term goal of practically everyone who has studied our creaky, misguided tax system—efforts that span 50 years of Republican and Democratic governors alike. They all concluded the same thing: The high sales taxes here are uniquely punishing to the poor. A national tax study last spring ranked Washington as the most regressive in the nation by far—meaning nobody heaps the burden on the poor like we do."

"[Washington] state ranks near last place nationally in education categories such as per-pupil funding, class size, and college attendance," a recent analysis in the *Boston Globe* concurred. "Washington has long cited a paucity of tax revenues for such failings. Yet, at the same time, it gives away more money in corporate tax breaks than any other state aside from New York, which has nearly three times the population."

One could argue that the very unfairness of the state's tax profile may lie at the root of voters' repeated angry attempts to wreck the funding mechanism for programs popularly supported.

Among those popular programs is, of course, funding for public schools; and in its series of decisions, the Supreme Court narrows competing interests and focuses the attention of the Legislature.

In August, the Supremes pulled a form of I-1366 of its own, hammering lawmakers for having wasted 11 months in defiance of their *McCleary* order and fining the state $100,000 per day until the legislature satisfies the court's judgement. After three special sessions, the Legislature failed to provide a clear and fully funded plan. The money will go into a special basic education account. And, "should the legislature hold a special session and during that session fully comply with the court's order, the court will vacate any penalties accruing during the session," the court generously offered.

The governor did not call for a special session, in part to keep the pressure on lawmakers, and created instead a "working group" to clarify solutions. Among the working group members representing each party caucus in the House and Senate are Rep. Kris Lytton (D-Anacortes) and Sen. Doug Ericksen (R-Ferndale).

Ericksen—who continues to personify the very reason the Supremes struck state legislators in the head with a hammer in the first place—ruled out an increase in

revenues and doubled down on the concept of educational alternatives such as private and charter schools. Ericksen also called for supermajority requirements to be hard-coded into the state constitution that would further destroy the ability of lawmakers to find solutions.

His catcalls hardly matter. The court has already ruled on the requirements of public education and charter schools; and they've commented on supermajority requirements. Slowly, the court has reduced his mischiefs of faction to the mischiefs of fiction.